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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~108.~~ 183

JOHN I. ROBBINS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED DECEMBER 24, 1869.

SUPREME COURT OF THE UNITED STATES.

No. 408.

JOHN I. ROBBINS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

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1 Proceedings of the circuit court of the United States of America for the district of Kentucky, at the regular term begun and held at the federal court-hall in the city of Covington, on the 20th day of April, A. D. 1869.

Present, the Hon. Bland Ballard, judge of the United States for the district of Kentucky.

UNITED STATES
vs.
GEORGE S. HALE, ALBERT G. RUST, ANDREW H. HEROD, & JOHN I. ROBBINS. } No. 12.—Debt.

Be it remembered that heretofore, to wit, on the 6th day of July, 1866, came B. H. Bristow, esq., attorney of the United States, and filed in the clerk's office of our said court at Louisville his declaration in the above cause, which is in the words and figures following, to wit:

2 UNITED STATES OF AMERICA, *Sixth Circuit & District:*

In the circuit court of the United States within and for the sixth circuit and district of Kentucky.

The plaintiffs, The United States of America, complain of the defendants, Geo. S. Hale and Albert G. Rust, late partners in the manufacture of tobacco, doing business under the name and style of Hale & Rust, and Andrew H. Herod and John J. Robbins, in custody of a plea, &c., of debt, that the said defendants render unto the said plaintiffs the sum of six thousand dollars, ($6,000 00,) which the said defendants owe to, and unjustly detain from, the plaintiffs:

For that heretofore, to wit, on the first day of July, 1865, at the circuit and district aforesaid, the said defendants, by their certain writing obligatory, signed, sealed and executed, and delivered to the plaintiffs, and here shown to the court, bound themselves jointly and severally in the words and figures following, to wit:

"Know all men by these presents that we, George S. Hale and Albert G. Rust, of the firm of Hale & Rust, as principals, and Andrew
3 Herod and John J. Robbins, as sureties, all of the city of Covington, Kenton County, Kentucky, are held and firmly bound unto The United States of America in the full and just sum of six thousand dollars, money of the United States; and which payment, well and truly to be made, we bind ourselves, jointly and severally, our joint and several heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this first day of July, A. D. 1865; assessor of internal revenue for the 4th collection district of the State of Kentucky, for a license as a manufacturer of tobacco, at corner of Banklick & 9th streets, situate in the city of Covington, county of Kenton, and State aforesaid:

"Now, therefore, condition of the foregoing obligation is such, that if the said Hale & Rust shall comply with all the requirements of law in regard to any persons, firms, companies, or corporations engaged in the manufacture of tobacco, snuff, or cigars; and shall not manufacture, or employ others to manufacture, tobacco, snuff, or cigars, without first obtaining the requisite permit therefor; and shall not engage in any attempt by himself, or by collusion with others, to defraud the government of any

tax or duty on any manufacture of tobacco, snuff, or cigars; and
4 if he shall render truly and correctly all the returns, statements, and inventories prescribed for such manufacturers; and shall pay to the collector of the district all the duty or taxes which may or shall be assessed and due on any tobacco, snuff, or cigars so manufactured; and shall not knowingly sell, purchase, or receive for sale, any such tobacco, snuff, or cigars which has [has] not been inspected and branded or stamped as required by law, or upon which the tax has not been paid, then the above obligation to be void and of no effect; otherwise it shall abide and remain in full force and virtue.

"HALE & RUST.
"ANDREW H. HEROD.
"JOHN I. ROBBINS.

"Signed, sealed, and delivered in the presence of—
"A. C. KING.
"S. A. CHARLES."

Nevertheless, the plaintiffs state that the said defendants Hale & Rust, tobacco manufacturers as aforesaid, have not kept, observed, and complied with the conditions and requirements of said writing obligatory, but have broken and violated the same in the following respects, to wit:

First. That the said Hale & Rust did not make, render, truly and correctly, all the returns, statements, and inventories prescribed for such manufacturer of tobacco, snuff, &c.

5 Second. The said Hale & Rust did not pay to the collector of the district all the duty or taxes which was legally and properly assessed and due on tobacco manufactured by them for and during the period of time beginning August, 1865, and ending on the 31st March, 1866, amounting in the aggregate to the sum of twenty-five thousand five hundred and fifty-five dollars and sixty cents, which is still due and unpaid, as appears by a statement which has been filed in this court and is referred and made part of this declaration, a copy of which will be filed herewith and shown to the court, which statement was made by Ja's J. Hudnall, collector of 6th collection dist. of K'y.

Third. That the said Hale & Rust did not make out and deliver to the assistant assessor of the assessment district a true statement or inventory of the quality of each of the different kinds of tobacco held or owned by them, and what was purchased from others, whether chewing, smoking, fine-cut, shorts, pressed, or plug, &c.

Fourth. The said Hale & Rust did not pay to the collector of the district all the duty or taxes which were legally and properly assessed and due on the tobacco manufactured by them for and during the period of time beginning on said 1st day of August, 1865, and ending on 31st day of March, 1866.

6 Fifth. That the said Hale & Rust did neglect to have the tobacco manufactured by them within the period of time last aforesaid inspected and verified by an inspector [by an inspector] appointed under the internal revenue laws, and did remove the same for consumption without such inspection.

Whereby and by reason wherof the defendants became and are liable to pay to plaintiffs the sum first demanded, and thereby, and by force of the statue in such cases made and provided, an action hath accrued to the pl'ff, to demand and sue for the same; yet the said defendant, although often requested so to do, have hitherto wholly [wholly] refused

and failed, and yet refuse and fails, so to do, to the damage of plaintiffs in the sum of six thousand doliars.

Wherefore they sue, &c.

B. H. BRISTOW,
U. S. Att'y K'y Dist.

The following is the statement refered to in the foregoing declaration, to wit:

UNITED STATES INTERNAL REVENUE,
COLLECTOR'S OFFICE, 6TH DISTRICT OF K'Y,
Covington, May 15th, 1866.

7 *Statement of assessments and payment by Hale and Rust, of the city of Covington, Kentucky, on manufacture.*

Assessment list.	Quantity.	Amount of tax.	Date of payment.	Amount paid.
Aug., 1865	8,228	3,291 20	Sept. 25th, 1865	3,291 20
Sept., "	9,696[2]	3,878 60	Oct. 31, "	3,878 60
Oct., "	12,775	5,110 00	Nov'r 29, "	5,110 00
Nov.	8,603[2]	3,441 40	Dec'r 30, "	807 40
Dec'r	14,725	5,890 00	Jan'y 31, 1866	2,377 20
Jan'y, 1866	18,496[4]	7,398 60	" "	3,332 80
" "			" "	180 00
Feb'y	2,565	1,026 00	Feb'y 28th	3,052 40
M'ch	2,496[2]	998 60	M'ch 3	1,500 00
			" 31	1,026 00
	Cr.---- ----	31,034 40		
By payment	---- ----	24,555 60		24,555 60
		6,478 80	Balance due the United States.	

JA'S J. HUDNALL,
Collector 6th Dist. of Kentucky.

The following is the summons:

The President of the United States of America to the marshal of the Kentucky district, greeting:

8 You are hereby commanded to summon George S. Hale and Albert G. Rust, partners as Hale and Rust, Andrew H. Herrord and John I. Robbins, if they be found within your district, to appear before the circuit court of the United States of America for the Kentucky district, on the first day of its next October term, to be held at the city of Louisville, to answer unto United States in a plea of debt for $6,000, damages $6,000; and have you then and there this writ.

Witness S. P. Chase, Chief Justice of the Supreme Court of the United States, at Louisville, in the said district, this 6th day of July, in the year of our Lord 1866, and of our independence the 91st.

[L. S.] A. J. BALLARD, *C. C. C. K. D.*,
By P. A. GARTNER, *Deputy.*

Executed by delivering a copy of the within to the within-named Albert G. Rust, Andrew H. Herrord and John I. Robbins, George S. Hale, of this district, July 13th, 1866.

F. SATTERWHITE, *U. S. D. M.*

Marshal's fees: 150 miles' travel to Covington, @ 6 cts. per mile, $9 00; services 3 summons, 2 00 each, $6 00.

9 Afterwards, to wit, October, 3rd, 1866, the following order was made:

Order.

This day came the defendants, by their attorney, Jno. F. Fisk, and, at their motion, it is ordered that this cause be transferred for trial to our court to be held at the city of Covington.

Afterwards, to wit, Dec'r 5th, 1866, at a court held in the city of Covington, the following order was made:

This day came the district att'y; came also the defendants, by their attorney, Jno. F. Fisk, esq. The defendants, by their said attorney, filed their seperate pleas herein. And, on motion of defendants, this cause is continued until the next term of this court, at their cost.

It is therefore considered by this court that the plaintiff recover of the defendants their costs at this court expended.

The following is the plea of A. G. Rust:

Circuit court of the United States for the fifth circuit and district of Kentucky.

UNITED STATES
vs.
HALE AND RUST. } In debt.

10 Separate plea of the defendant Albert G. Rust.

And now, by leave of the said court first had and obtained, the said defendant Albert G. Rust comes and defends and say that he does not owe the said sum of money above demanded, or any part thereof, in manner and form as the said plaintiff, The United States, hath complained against him. And of this he puts himself upon the country, &c.; and the said plaintiff doth the like.

JOHN F. AND CHA'S H. FISK,
Att'ys for Defendants.

The following is the plea of A. H. Herod:

Circuit court of the United States for the fifth circuit and district of Kentucky.

UNITED STATES
vs.
HALE AND RUST, ANDREW H. HERROD, AND John I. Robbins, } In debt.

Seperate plea of the defendant A. H. Herod.

11 And now, by leave of the said court first had and obtained, the said defendant Andrew H. Herod comes and defends and says that he does not owe the said sum of money above demanded, or any part thereof, in manner and form as the said plaintiff, The United States, hath complained against him. And of this he puts himself upon the country, &c.; and the said plaintiff doth the like.

JOHN F. AND CHA'S H. FISK,
Att'ys for the Defendants.

The following is the plea John I. Robbins:

Circuit court of the United States for the sixth circuit and district of Kentucky.

UNITED STATES
vs.
HALE AND RUST, ANDREW H. HEROD, & JOHN I. Robbins. } In debt.

Seperate plea of the defendant John I. Robbins.

No. 1.

And now, by leave of the said court first had and obtained, the said defendant John I. Robbins comes and defends and says that he
12 does not owe the said sum of money above demanded, or any part thereof, in manner and form as the said pl't'ff, The United States, hath complained against him. And of this he puts himself upon the country; and the said pl't'ff doth the like.

KEBLER AND WHITMAN,
Att'ys for the Defendants.

Afterwards, to wit, Dec'r 3rd, 1867, the following order was made:

This day came the district attorney and filed demurrer to the pleas herein. Thereupon, the law arising upon said demurrer having been argued, it seems to the court that the law is for the United States. It is therefore considered by the court that said demurrer be sutained.

On motion of the district att'y, this cause is abated as to George S. Hale.

On motion of the district att'y, and it appearing from the marshal's return on the summons that it has been duly executed on the defendants A. G. Rust, A. H. Herod, & John I. Robbins, and they failing to
13 appear, though solemny called, came not, but made default, it is therefore adjudged by the court that the plaintiff, The United States, recover of the defendants A. G. Rust, A. H. Herod, and John I. Robins the sum of $6,000, with interest thereon at the rate of six per cent. per annum from the 31st day of March, 1866, till paid, and their cost in this behalf expended.

Afterwards, to wit, on the 5th December, 1867, the following order was made:

This day came the defendant Jno. I. Robbins, by his attorney, Whitman, esq.; also came the district att'y, B. H. Bristow, esq. Defendant moved the court to set aside the judgment rendered herein on the 1st day of this term. The motion was heard and sustained, and the judgment set aside. Said defendant then filed his plea herein.

The district attorney then moved to have the order abating this cause as to George S. Hale set aside. The motion was heard and sustained, and the order set aside. An alias summons was awarded against said defendant Hale; and this cause is continued until the next term of this court.

14 The following is the pleas referred to:

United States of America, the sixth circuit and district of Kentucky.

UNITED STATES
vs.
GEO. S. HALE, ALBERG G. RUST, LATE PARTNERS as Hale & Rust, Andrew H. Herod, and John I. Robbins.

Pleas in bar by defendant Jno. I. Robbins.

No. 2, pleas.

And now comes the said defendant John I. Robbins, by his att'y, Kebler and Whitman, and defends the wrong and injury, where, &c., and craves oyer of the said declaration mentioned, and it is read to him, &c.; and also craves oyer of the condition of said writing obligatory thereunder written, and it is read to him, &c., as in said declaration set forth. And thereupon, for plea in this behalf, the said defendant says that the said plaintiff ought not to have or maintain his aforesaid action against him, because he says that after the making of the said writing obligatory and the condition thereof aforesaid, which was
15 so made July 1st, 1865, and on which the said defendant was, by the terms of said writing obligatory, a surety only for the principals therein named, the said Hale and Rust found that his said principals had changed their place of business and largely increased the amount and risk of the same from what they were when he so became surety; and he thereupon, in the month of September, 1865, notified his said principals, and also caused the then collector of the fourth collection district of Kentucky, and who was the proper officer to notify in that behalf, and who had authority in the premises to receive bonds from manufactures of tobacco in said district who desired , as such manufactures to be notified, that he would no longer act or remain as surety for said principals on the said bond on the declaration set out. And the defendant further avers that, after said notice was so given and received, the said collector required his said principals, said Hale and Rust, to execute a new bond, in lieu of the one in the declaration
16 mentioned, in the penal sum of fifteen thousand dollars; that accordingly, on the said month of September, 1865, a new bond was executed in said penal sum of fifteen thousand dollars with said principals, Hale and Rust, by their firm name as principals therein, and the said Andrew H. Herod as surety, and which was not signed by this def't; that the conditions and stipulations in said last-named new bond were the same except in the amount of the penalty thereof as those in the bond in the declaration mentioned. And the defendant further avers that said new bond, though on its face bearing the date of May 1st, 1865, was in fact antedated to that time, and was in truth only executed in September, 1865. And the def't further avers that said new bond was, in September, 1865, delivered to and accepted by the collector of said district, by and with the consent and knowledge of said principals and said surety, Herod, and of this def't, in place of and a substitute for the said writing obligatory in said declaration men-
17 tioned; and the said principals, Hale and Rust, thereafter carried on their business under said bond with the knowledge and consent of said collector. And the defendant further avers that the said principals, the said Hale and Rust, during the months of July, August,

and September, 1865, which was the whole period of time between the execution of the said writing obligatory mentioned in said declaration, and the delivery and acceptance as aforesaid of said new bond, faithfully kept and performed all the conditions of said writing obligatory, and did comply with "all the requirements of law in regard to any persons, firms, companies, or corporations engaged in the manufacture of tobacco, snuff, or cigars, and did not manufacture or employ others to manufacture tobacco, snuff, or cigars without first obtaining the requisite permit thereof, and did not engage in any attempt, by themselves, or either of them, or by collusion with others, to defraud the government of any tax or duty, or any manufacture of tobacco, snuff, or cigars, and did render truly and correctly all the returns, statements, and inventories prescribed for such manufactures, and did pay to the collector of the district all the duty and taxes which were assessed and due on any tobacco, snuff, or cigars so manufactured, and did not knowingly sell, purchase, or receive for sale any such tobacco, snuff, or cigars which had not been inspected and branded or stamped as required by law or upon which the said tax had not been paid." And this the defendant is ready to verify.

Wherefore he prays judgment if the said plaintiff ought to have or maintain the said action against him, &c.

3rd plea.

And the said defendant John I. Robbins, for a second and further plea in this behalf, further defends the wrong and injury, when, &c., and craves oyer of the said writing obligatory thereunder written, and it is read to him, &c., as in said declaration set forth. And thereupon said defendants say that said pl't'ff ought not to have or maintain her aforesaid action against him, because he says that the said Hale and Rust, his principals in said writing obligatory, did, from time to time and at all times after the making of said writing obligatory and the said condition thereof, well and truly observe, perform, and fulfil, and keep all and singular the articles, clauses, payments, conditions, and agreements in the said condition of the said writing obligatory specified, comprised, and mentioned, on all things therein contained on their part and behalf to be observed, performed, fulfilled, and kept, according to the tenor and effect, true interest and meaning, of the said condition of the said writing obligatory, and "did comply with all the requirements of law in regard to any persons, firms, corporations, or companies engaged in the manufacture of tobacco, snuff, or cigars, and did not manufacture, or employ others to manufacture, tobacco, snuff, or cigars, without first obtaining the requisite permit thereof, and did not engage in any attempt, by themselves, or either of them, or by collusion with others, to defraud the government of any tax or duty on any manufactured of tobacco, snuff, or cigars, and did render truly and correctly all the returns, statements, and inventories prescribed for such manufactures, and did pay to the collector of the district all the duty and taxes which were assessed and due on any tobacco, snuff, or cigars so manufactured, and did not knowingly sell, purchase, or receive for sale any such tobacco, snuff, or cigars which had not been inspected and branded or stamped as required by law, or upon which the tax had not been paid." And this the said defendant is ready to verify.

Wherefore he prays judgment of the said plaintiff ought further to have or maintain his said action against him.

4th plea.

And, for a fourth and further plea in this behalf, the said defendant comes and defends the wrongs and injury, when, &c., and craves oyer of the writing obligatory in said declaration mentioned, and which is read to him, &c.; and also craves oyer of the condition of said writing
21 obligatory thereunder written, and it is read to him, &c., as in said declaration set forth; and says that the plaintiff ought not to have or maintain his aforesaid action against him, because he says that the said Hale and Rust, the principals in said writing obligatory, and for whom he was only surety thereon, did, from time to time and at all times after the making of said writing obligatory and the said condition thereof, well and truly observe, perform, fulfill, and keep all and singular the conditions and obligations therein set out and contained, according to the true intent and meaning of the said condition of the said writing obligatory and condition thereof, hitherto been demnified by means of any matter or thing in the said condition mentioned. And this the def't is ready to verify.

Whereupon he prays judgment of the plaintiff ought to have his said action against him, &c.

KEBLER AND WHITMAN,
Att'ys for Def't Jno. I. Robbins.

22 STATE OF KENTUCKY,
City of Covington, Kenton County, ss:

John I. Robbins, defendant, being duly sworn, deposes and says that the several pleas by him herein pleaded, and the matters therein contained, are true in substance and fact, as he realy believes; and he further states that he has a full and just and meritorious defence to the action against them herein, and that he desires to plead hereto, not for delay, but for justice only.

JOHN I. ROBBINS.

Sworn to before me by John I. Robbins this 5th day of Dec'r, 1867.
J. M. BLACKBURN, *D. C.*

23 Afterwards, to wit, Ap'l 21st, A. D. 1869, the following order was made:

Order.

This day came the district att'y and filed seperate demurr's to the pleas herein; and thereupon, the law arising upon said demurrers having been argured by the counsel, and the court being advised, it seems to the court that the law is for The United States, and that said demurrers be sustained.

The following are the demurrers referred to:

Sep. plea of A. H. Herod.

Circuit court U. S., 6th circuit.

U. S.
ag'st
HALE AND RUST, HEROD, AND JOHN I. ROBBINS.

Dem. to seperate plea of A. H. Herod.

And the said plaintiffs, as to the said plea of the said defendant by

them above pleaded, saith that the same, and the matters therein contained, in manner, and form as [therein contained in manner and form as] the same are above pleaded and set forth, are not sufficient in law to bar or preclude them, the said plaintiffs, from having or main-
24 taining their aforesaid action thereof against the said defendant. And this they, the said plaintiff, are ready to verify. Wherefore, by reason of the insufficiency of the said plea in this behalf, the said plaintiffs pray judgment and their debt aforesaid, together with their damages sustained by them on occasion of the detention thereof, to be adjudged to them.

B. H. BRISTOW,
U. S. Attorney K'y Dist.

Demur. to sep. plea of Jno. I. Robbins, No. 1.

U. S. circuit court, 6th circuit.

U. S.
ag'st
HALE AND RUST, & HEROD, & JOHN I. ROBBINS.

Dem. to seperate plea of John I. Robbins.

No. 1.

And the said plaintiffs, as to the said plea of the said defendant by him first above pleaded, saith that the same, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude them, the said plaintiff, from having or maintaining their aforesaid action thereof
25 against the said defendant; and that they, the said plaintiffs, are not bound by law to answer the same. Wherefore they pray judgment and their debt, together with their damages by them sustained on occasion of the detention thereof, to be adjudged to him.

B. H. BRISTOW,
U. S. Attorney.

U. S. circuit court, 6th circuit, K'y dist.

U. S.
ag'st
HALE & RUST, HERROD, & ROBBINS.

Demurrer to 2 plea of John I. Robbins.

And the said plaintiffs, as to the said plea of the said defendant by him above pleaded, saith that the same, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are [set forth are] not sufficient in law to bar or preclude them, the said plaintiffs, from having or maintaining their aforesaid action thereof against the said defendants; and that they, the said plaintiffs, are not bound by law to answer the same. Wherefore they pray judg-
26 ment and their debt, together with their damages by them sustained on occasion of the detention thereof, to be adjudged to them.

B. H. BRISTOW,
U. S. Attorney.

Demurrer to sep. plea of A. G. Rust.

Circuit court of the United States for the sixth circuit & Kentucky district.

U. S.
ag'st
HALE & RUST, JOHN I. ROBBINS, & A. H. HEROD.

Demurrer to seperate plea of A. G. Rust.

And the said plaintiffs, as to the said [plaintiffs as to the said] plea of the said defendant above pleaded, saith that the same, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude them, the said plaintiffs, from having or maintaining their aforesaid action thereof against the said defendant; and they, the said plaintiffs, are not bound by law to answer the same. And this they, the said plaintiffs, are
27 ready to verify. Wherefore, by reason of the insufficiency of the said plea in this behalf, the said plaintiffs pray judgment and their debt aforesaid, together with their damages by them sustained on occasion of the detention thereof, to be adjudged to them.

B. H. BRISTOW,
U. S. Attorney.

Afterwards, to wit, April 23d, A. D. 1869, the following order was made:

Order to set aside demurrers.

This day came the defendant John I. Robbins by his attorney, H. C. Whitman, esq., and on his motion the entry heretofore made sustaining the demurrer to the pleas herein is set aside.

Afterwards, to wit, April 24th, A. D. 1869, the following order was made:

Order filing pleas Nos. 4, 5, & 6.

This day came the defendant John I. Robbins by his attorneys, Keblar and Whitman, and filed pleas No. 4, 5, & 6 herein.

The following are the pleas:

Pleas.

United States circuit court, sixth circuit & dist. of Kentucky.

UNITED STATES
vs.
GEO. S. HALE, ALBERT G. RUST, LATE partners as Hale & Rust, Andrew H. Herod, & John I. Robbins. } Plea in bar to—

28 And now comes the said defendant John I. Robbins by his att'ys, Kebler & Whitman, and by leave of the court first had

and obtained, and defends the wrong and injury, when, &c., and craves oyer of the said writing obligatory in said declaration mentioned, and it is read to him, &c.; and also craves oyer of the condition of the said writing obligatory thereunder written, and it is read to him and as in said declaration set forth; and therefore, for a fourth and further plea in this behalf, the said defendant says that he was only a surety in the said writing obligatory in the declaration declared on for the said Hale and Rust, who were the principals therein, and that said bond was given by said Hale and Rust to the pl't'ffs, under and by virtue of the laws of the United States as manufactures of tobacco, as a condition-precedent to the giving said Hale and Rust a license as such manufactures of tobacco, and that it was entered in the said bond, in the said declaration set out, that the said Hale and Rust had made applica-
29 tion [for] to the assessor of internal revenue for the 4th collection district of the State of Kentucky for a license as manufacture of tobacco, at corner of Banklick and 9th streets, situate in the city of Covington and county of Kenton and State aforesaid; that the said bond declared on in said declaration, in all its several conditions and obligations affecting this defendant, was given by said Hale and Rust and accepted by the plaintiff solely in reference to the carrying on such business of manufactures of tobacco at the said place, so as aforesaid recited in the said bond, and at no other place whatever. And the defendant avers that the said Hale and Rust, in Sept., 1865, to wit, on or about the first of September, A. D. 1865, removed their business as such manufactures of tobacco, wholly from the said place so as aforesaid recited in said bond, and from thence hitherto have never carried on said business at said so recited place, but after their said removal did estab-
lish and carry on business as manufactures of tobacco at another
30 and different place, to wit, on Pike street, in said city of Covington, and this defendant avers that said removal and change of place of said business was without his consent. And this defendant avers that he, as such surety, executed said bond upon the conditions and recitals thereof only, and they confined his liabilities therein, to any breaches of the same which should happen while the said Hale and Rust so carried on business at said recited place. And he avers that none of the breaches of said bond, in said declaration alleged, occured during the time the said Hale and Rust so carried on business at said recited place, but that, during the whole of said time, the said Hale & Rust kept and fulfilled each and all of the stipulations and conditions of said bond. And this the defendant is ready to verify.

Wherefore he prays judgment of the plaintiff ought to have in said action against him.

5th plea.

And the defendant John I. Robbins, for the 5th and further
31 plea by leave first, comes and defends the wrong and injury, when, &c., and craves oyer of the said writing obligatory in said declaration mentioned, and it is read to him; and also craves oyer of the condition of said writing obligatory in said declaration mentioned thereunder written, and it is read to him as in said declaration set forth; and therefore said defendant says that said plaintiff ought not to have or maintain his aforesaid action against him, because he says that by same the collector of the 4th collection district of Kentucky, in which district the said writing obligatory in the declaration set out was given, had full power and authority at his discretion to change and renew the

38 The following are the demurrers referred to in the foregoing order:

Demurer thirdly.

In the circuit court of the United States of America for the sixth circuit and Kentucky district.

UNITED STATES
vs.
HALE AND RUST, &C. } Demurrer.

And the said plaintiffs, as to the said plea of the said defendant John I. Robbins by him thirdly above pleaded, saith that the same, and the matters therein contained, in manner and form as above pleaded and set forth, are not sufficient in law to bar or preclude them, the said plaintiffs, from having or maintaining their aforesaid action thereof against the said defendant, and that they, the said plaintiffs, are not bound by law to answer the same. And this, they, the said plaintiffs, are ready to verify.

Wherefore, by reason of the insufficiency of the said plea in this behalf, the said plaintiffs pray judgment and their debt aforesaid, together with their damages by them sustained on occasion of the detention thereof, to be adjudged to them, &c., &c.

B. H. BRISTOW,
U. S. Attorney.

39 *Demurrer 4th.*

In the circuit court of the United States of America for the sixth circuit and Kentucky district, ss.

UNITED STATES
vs.
HALE, RUST, &C. } Demurrer.

And the said plaintiffs, as to the said plea of the said defendant John I. Robbins by him fourthly above pleaded, saith that the same, and the matters therein contained, in manner and form as above pleaded and set forth, are not sufficient in law to bar or preclude them, the said plaintiffs, from having or maintaining their aforesaid action thereof against the said defendant, and that they, the said plaintiffs, are not bound by law to answer the same. And this they, the said plaintiffs, are ready to verify.

Wherefore, by reason of the insufficiency of the said plea in this behalf, the said plaintiffs pray judgment and their debts aforesaid, together with their damages by them sustained on occasion of the detention thereof, to be adjudged to them, etc., etc.

B. H. BRISTOW,
U. S. Attorney.

40 *Sixth demurer.*

In the circuit court of the United States of America for the sixth circuit and Kentucky district.

UNITED STATES
vs.
HALE & RUST, AND C. } Demurrer.

And the said plaintiffs, as to the said plea of the said defendant John

I. Robbins by him sixthly above pleaded, saith that the same, and the matters therein contained, in manner and form as above pleaded and set forth, are not sufficient in law to bar or preclude them, the said plaintiffs, from having or maintaining their aforesaid action thereof against the said defendant, and that they, the said plaintiffs, are not bound by law to answer the same. And this they, the said plaintiffs, are ready to verify.

Wherefore, by reason of the insufficiency of the said plea in this behalf, the said plaintiffs pray judgment and their debt aforesaid, together with their damages by them sustained on occasion of the detention thereof, to be adjudged to them, etc.

B. H. BRISTOW, *U. S. Attorney.*.

41 Afterwards, to wit, April 27th, A. D. 1869, the following order was made:

Order & verdict of jury.

This day came the district attorney; came also the defendant John I. Robbins by his attorneys, Kebler and Whitman. The court now being sufficiently advised, it seems to the court that the law arising upon the demurrer to the 2d and 5th pleas is for the United States. It is therefore considered that said demurrers be sustained. The district attorney waves breaches 1, 3, & 5. The defendant filed plea No. 8. District attorney filed replication to plea No. 8. Defendant Robbins filed similiter. To try the issue joined, let a jury come. Thereupon came the following jury, to wit, Henry Drexelius, J. Mills, Uriah Shuckle, J. R. Mills, George Beatty, Geo. L. Forman, Jno. Whitehead, L. K. Frazier, Cha's Assman, E. R. Sparks, P. G. Flood, and M. C. Motch, who were elected, tried, and sworn well and truly to try the issue joined, and a true verdict render, according to the law & evidence. The evidence was heard in full, and the instructions of court delivered; and the jury returned into court the following verdict, viz:

42 "We, the jury, find for the United States in the sum of six thousand dollars in damages.

"GEORGE BEATTY, *Foreman.*"

It is therefore considered by the court that the plaintiff, The United States of America, recover of defendant John J. Robbins the sum of six thousand dollars in damages, and their costs in this suit expended.

The defendants George S. Hale, A. G. Rust, and A. H. Herod were duly called, but came not, and therein made default. It is therefore considered by the court that the plaintiff, The United States of America, recover of defendants G. S. Hale, A. G. Rust, and A. H. Herod the sum of six thousand dollars, the debt in the declaration demanded, and their costs in this behalf expended.

The following are the demurrers 2 & 5 referred to in the foregoing order:

In the circuit court of the United States of America for the sixth circuit and Kentucky district, ss.

UNITED STATES *vs.* HALE AND RUST, AND C. } Demurrer.

43 And the said plaintiffs, as to the said plea of the said defend-

ant John I. Robbins by him secondly above pleaded, saith that the same, and the matters therein contained, in manner and form as above pleaded and set forth, are not sufficient in law to bar or preclude them, the said plaintiffs, from having or maintaining their aforesaid action thereof against the said defendant, and that they, the said plaintiffs, are not bound by law to answer the same. And this they, the said plaintiffs, are ready to verify. Wherefore, by reason of the insufficiency of the said plea in this behalf, the said plaintiffs pray judgment and their debt aforesaid, together with their damages by them sustained on occasion of the detention thereof, to be adjudged to them, etc.

B. H. BRISTOW,
U. S. Attorney.

Demurrer 5th.

In the *United* [circuit] court of the United States of America for the sixth circuit and Kentucky district, ss.

UNITED STATES
vs.
HALE AND RUST, &C. } Demurrer.

And the said plaintiffs, as to the said plea of the said defend-
44 ant John I. Robbins by him fifthly above pleaded, saith that the same, and the matters therein contained, in manner and form as above pleaded and set forth, are not sufficient in law to bar or preclude them, the said plaintiffs, from having or maintaining their aforesaid action thereof against the said defendant, and that they, the said plaintiffs, are not bound by law to answer the same. And this they, the said plaintiffs, are ready to verify. Wherefore, by reason of the insufficiency of the said plea in this behalf, the said plaintiffs pray judgment and their debt aforesaid, together with their damages by them sustained on occasion of the detention thereof, to be adjudged to them, etc.

B. H. BRISTOW,
U. S. District Attorney.

Plea No. 8 is as follows:

And, for an eight and further plea in this behalf, by leave first had, the said defendant John I. Robbins comes and further defends when,
&c., and as to the said second breach of the said writing obliga-
45 tory by the plaintiff in his declaration specially assigned, says that the said plaintiff ought not further to have or maintain his said action against him, because he says that after the accruing of the debts and causes of action under said writing obligatory in said second breach alleged, and before the commencement of this suit, to wit, on the first day of July, 1866, the said Hale and Rust, his principals in said writing obligatory, paid to the said collector divers sums of money, amounting, to wit, to all the moneys in the said breach mentioned, in full satisfaction and discharge of all the debts and causes of action in said breach set out; which payment the said collector did then and there accept of and from said Hale and Rust in such full satisfaction and discharge as aforesaid. And this the defendants is ready to verify. Whereupon he prays judgment of the plaintiff ought to maintain his aforesaid action against him.

9th plea.

And, for a ninth and further plea in this behalf by leave first
46 had, the said defendant John I. Robbins comes and further defends, where, &c., and says that, as to the said fourth breach of the said writing obligatory by the plaintiff in her declaration specially assigned, [says that] the plaintiff ought not to have or maintain her said action against him, because he says that after the accruing of the debts and causes of action under said writing obligatory in said fourth breach specially assigned, and before the commencement of this suit, to wit, on the first day of July, 1866, the said Hale and Rust, his principals in said writing obligatory, paid to the said collector divers sums of money, amounting, to wit, to all the monies in the said fourth mentioned, in full satisfaction and discharge of all the debts and causes of action in said breach set out; which payment the said collector did then and there accept of and from said Hale & Rust in such full satisfaction and discharge as aforesaid. And this the defendant is ready to verify. Wherefore he prays judgment of the plaintiff ought to maintain his aforesaid action against him, &c.

KEBLER AND WHITMAN,
Atty's for Def't.

47 The following is the replication:

Replication.

United States circuit court, sixth circuit & Kentucky district.

And the said plaintiff, as to the said plea of the said defendant Robbins eightly by him above pleaded, by reason of anything by the said defendant in said plea alleged, ought not to be barred from having and maintaining their aforesaid action thereof against said defendant, because they say that the said Hale and Rust, or either of them, did not pay to the plaintiffs or to the said collector divers sums of money in said second breach mentioned in satisfaction and discharge of all the debts and causes of action in said declaration set out, nor did the said Hale and Rust, or either of them, or the said defendant Robbins, or any other person, at the time set out in first plea, or at any other time, pay to the United States or to the said collector the said sum or sums of money or any part thereof. And this the said plaintiff prays may be enquired of by the country.

B. H. BRISTOW,
U. S. Dist. Att'y.

And def't doth the like.

48 The following is the similiter:

Similiter.

United States circuit court, sixth circuit, & Kentucky district, ss.

And the said plaintiff, as to the said plea of the said defendant Robbins by him ninthly above pleaded, by reason of anything by the said defendant in said plea alleged, ought not to be barred from having and

maintaining their aforesaid action thereof against said defendant, because they say that the first day of July, 1866, nor at any other time, pay to the plaintiff or to the said collector divers sums of money, amounting to all the monies in the said fourth breach mentioned, in full satisfaction and discharge of all the debts and causes of action in said breaches set out, nor did the said Hale and Rust, or either of them, or the defendant Robbins, or any other persons for them or either of them, pay to the said plaintiff or to said collector, said sums of money mentioned in said declaration, or any part thereof. And this they pray may be enquired of by the country.

B. H. BRISTOW,
U. S. Dist. Attorney.

And def't doth the like.

49 The following is the citation:

UNITED STATES OF AMERICA,
District of Kentucky, ss:

To The United States of America, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the said district of Kentucky, wherein John I. Robbins is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this first day of May, in the year of our Lord 1869, and of our independence the ninety-third.

[L. S.] BLAND BALLARD.

50 The following is the writ of error:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the sixth circuit and district of Kentucky, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court, before you, between The United States of America and John I. Robbins, a manifest error hath happened, to the great damage of the said John I. Robbins, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 6th
51 day of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein,

to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 1st day of May, A. D. 1869, and of our independence the ninety-third.

[L. S.] J. M. BLACKBURN,
C. C. C. K. D.

UNITED STATES OF AMERICA,
Kentucky District, ss:

I, James M. Blackburn, clerk of the United States circuit court for the district aforesaid, (at Covington,) certify that the foregoing 51 pages, this one included, contain a true and correct transcript of the record & proceedings in the cause mentioned in the caption hereof, as the same remains on file in the records of my office.

52 In witness whereof I have hereunto set my hand and seal of said court this 8th day of October, A. D. 1869.

[SEAL.] J. M. BLACKBURN, *Clerk.*

(Indorsement on cover:) No. 408. John I. Robbins, plaintiff in error, vs. The United States. Kentucky C. C. U. S.
Filed 24th December, 1869.

Robert Clarke & Co., Printers, 65 West Fourth Street, Cincinnati, Ohio.

Supreme Court of the United States

No. 408.

JOHN I. ROBBINS, Pl'ff in Error,

VS.

THE UNITED STATES.

In Error to the Circuit Court of the United States for the District of Kentucky.

BRIEF FOR PLAINTIFF IN ERROR.

KEBLER & WHITMAN,
Attorneys for Plaintiff in Error.

Note.

ERRORS IN THE TRANSCRIPT OF THE RECORD.

The printed transcript of the record, as furnished by the Clerk in Covington, is full of mistakes. He has, however, made out a certificate as to most of the errors, under his hand and seal, as will be seen. All errors have not been corrected, however.

On page 1, there is left out of the Bond a few words, relative to the application by Hale & Rust for a license as manufacturers of Tobacco. Enough, however, appears as to that to enable the Court to read it as it should be. And by aid of the certificate of correction, the whole record will be understood.

CERTIFICATE.

I do hereby certify that in the printed transcript of record of the case, No. 408, in Supreme Court United States, *John I. Robbins, plaintiff in error*, v. *United States, defendant in error*, the following errors and omissions occur, viz:

Page 1. The word "*The*" is omitted.

" 6. The word "*manufacturers*" is misspelled, and the word "*license*" omitted, and the letter "*S*," and the letter "*A*," also omitted.

" 7. The word "*interest*" should be "*intent.*"

" 8. After the word obligatory, it should read, "*and defendant further says that the plaintiff hath not, at any time since the making of the said writing obligatory,*" etc.

" 11. The word "*manufacturers*" is misspelled *several* times, and the word "*Therefore*" should be "*Thereupon*" and the word "*same*" should be "*law.*"

" 12. The word "*manufacturer*" is misspelled, and the word "*is*" omitted; the word "*make*" should be "*revoke.*"

" 13. The word "*acceptions*" should be "*acceptances,*" the word "*make*" should be "*revoke,*" and the word "*were*" is omitted.

" 13. The word "*contract*" should be "*control,*" in both places where marked; the words "*were,*" "*longer,*" and "*obligees,*" are omitted; the word "*make*" should be "*revoke;*" the word "*acceptions*" should be "*acceptances.*"

" 17. The word "*breach*" is omitted.

SEAL

J. M. BLACKBURN,
C. C. C. K. D.

BRIEF.

This case is one of peculiar hardship upon the plaintiff in error. The leading facts are these, as disclosed in the record.

Prior to July 1, 1865, George S. Hale and Albert G. Rust, partners as Hale & Rust, applied to the United States Assessor of Internal Revenue for the Fourth Collection District of Kentucky, for a license, under the revenue laws then in force, as manufacturers of tobacco—the business to be carried on, as represented in such application, at the corner of Banklick and Ninth streets, in the city of Covington, county of Kenton, and State of Kentucky. By the laws in force, before such license could be issued as asked, it was required, as a condition precedent thereto, that Hale & Rust should give a bond with sureties to the United States, conditioned for the full compliance, on the part of Hale & Rust, of all the requirements of the law in that behalf, as set out in said bond, and especially that they should not manufacture or employ others to manufacture tobacco *without first obtaining the requisite permit therefor*. On July 1, 1865, Hale & Rust, as principals, and Andrew Herod and this plaintiff in error, John I. Robbins, as sureties, executed the required bond in the penal sum of $6,000, which bond was accepted by the collector, and the license asked for was issued, *authorizing* Hale & Rust to carry on business as such manufacturers of tobacco *at the place* therein specified, at the corner of Banklick and Ninth streets, Covington, Kentucky. The *bond recites* that *the application* is for a license to Hale & Rust as manufacturers at *that place*, and the laws then in *force required the application and the license* to state the street and place *where the business* was to be carried on—the bond to follow the statement as to place; and it was illegal to remove the business to or manufacture at a different place than the one specified in the license without a new license. That Hale & Rust on or about the 1st of September, 1865, removed their business wholly as such manufacturers from the place in the license and bond stated, and established and carried on their business at another and different place, to-wit: Pike street,

in Covington; and they never after said removal and change carried on business at the place so recited in the license and bond.

That such removal and change were made without the consent of the plaintiff in error as such surety. That, when the plaintiff in error found that his principals had so changed their place of business, and had also largely increased the amount and risk of the same from what they were when he became their surety, he, in said month of September, 1865, notified his principals, Hale & Rust, and also caused the collector having authority in the matter to be notified that he would no longer act or remain as surety for said Hale & Rust on said bond of July 1, 1865. Said bond is the one on which the suit herein is brought. That after this notice was so given and received, the said collector required said Hale & Rust, the principals in the said bond of July 1, 1865, *to execute a new bond in lieu* of the one sued on, and that accordingly in the said month of September, 1865, a *new bond was executed*, in the penal sum of $15,000, by the said Hale & Rust as the principals, and said Andrew H. Herod as surety, but which *was not* executed or signed by the plaintiff in error. That the conditions and stipulations in the new bond were the same as in the old bond, except the penalty, and also that under the law, the new bond was given upon, and after removal of Hale & Rust to the new place of business, and as required by such removal. That this new bond was on its face dated May 1, 1865, but was in fact *not* given or executed until in September 1865, *and was antedated* to May 1, 1865. That this new bond was, in September 1865, *delivered to to and accepted by the collector* of said district, by *and with the consent and knowledge of said principals, Hale & Rust*, and said surety, *Herod* and of this *plaintiff in error, in place of and as a substitute for the bond of July* 1, 1865, *declared on in this action. That said Hale & Rust thereafter carried on their business under this substituted bond with the knowledge and consent of said collector, and that during the* months *of July, August, and September*, 1865, *which was the whole period of time between the execution of the bond sued on in this action and the execution and delivery and acceptance as aforesaid of the new bond of September*, 1865, Hale & Rust, principals, kept and performed all the conditions in the bond named, to which the plaintiff in error was

a party as surety, *and that no breach* whatever occurred under said first bond, *but all* the breaches assigned in the *narr. occurred under the new bond*, to which plaintiff in error *was not a party*. In addition to general allegations of performance, each and all the breaches are specially denied, and all negative and disjunctive conditions or stipulations are specially denied or affirmed, and the fact also appears that the plaintiff below (defendant in error above) *was not injured* by means of anything *under the first bond*, and suffered no loss thereby.

That the said bond of July 1, 1865, sued on herein, was, in all its conditions affecting the plaintiff in error, given by said Hale & Rust, and accepted by plaintiff below, *solely in reference to the carrying* on such business as manufacturers of tobacco, *at the place recited* in said *bond*, and at *no other* place *whatever*. And that this plaintiff in error, as surety, executed said bond upon *the conditions* and *recitals* therein *contained only*. That the said collector had, by law, full power to change and renew the bond of Hale & Rust, and to accept, as he did, the new bond in place of and as a substitute for the first one. That while the plaintiff in error was holden for all breaches under the bond he signed, he was not, and is not, for any breaches under this substituted bond which he did not sign, and as before stated, it is not claimed that any breach did occur under the first bond, nor did any so occur.

That on or about the first day of December, 1865, the collector ordered the tobacco manufactory of said Hale & Rust, with its stock and machinery, to be seized under the revenue laws of the United States, for alleged non-payment of taxes due; and papers to that effect were made out in the collector's office. That after said order had been made, and papers prepared to effect said seizure, to prevent said seizure, and to secure to the United States payment of said taxes, it was agreed, between the collector on the part of the United States, plaintiff below, and the said Hale & Rust, and said Andrew H. Herod, one of the sureties on the first bond and sole surety on the second bond, that the said Hale & Rust should place in the hands of said Herod, as the agent of said collector, and for the security of the plaintiff, an amount of property sufficient to satisfy and discharge all the liabilities of the said Hale & Rust

to the plaintiff for the non-payment of the said taxes; and it was also further agreed, between said parties, that when said sufficient amount of property should be so placed in said agent's hands, then that the said collector would revoke said order of seizure, and that the papers which had been made out to effect the seizure should be withdrawn by him. It was also further agreed, that said property, when placed in such agent's (Herod's) hands, should be sold by said Herod, and the proceeds by him paid over to said collector to satisfy and discharge said taxes, and that said collector would look to said property only to pay said taxes; and that in conformity to said agreement the said Hale & Rust did give to and turn over to said Herod, for the sole purpose aforesaid, a sufficient amount of property, including, among the other things, all the stock, fixtures, and machinery of the said tobacco manufactory of said Hale & Rust, together with a large amount of good collectable drafts and acceptances belonging to said Hale & Rust, to pay all said taxes, and said collector did thereupon revoke said order of seizure, and the papers were withdrawn; and that in conformity to said agreement, sufficient property to pay and discharge all the liabilities of said Hale & Rust, under the bond in the declaration set out, was so left by said Hale & Rust in the control and authority of said collector for said purpose; and after Hale & Rust had thus turned over to the collector property ample to discharge all their liabilities under the bond, they gave up and abandoned the business of manufacturing tobacco in Covington, and never after had any control over said property, and it was never given back to them; and the plaintiff by its agent, the collector, and Herod retained the whole.

The declaration contained five breaches. The defendant's attorney waived the first, third, and fifth breaches, and retained only the second and fourth breaches. These, *alleged non-payment in money* to the collector of the taxes alleged to be unpaid—from August 1, 1865, to March 1, 1866. The ruling of the Court upon the demurrers cut off then wholly from the plaintiff in error all defenses to the action, as arising out of the facts heretofore stated; and left only on the issues to the country, on the eighth and

ninth pleas, the simple question whether taxes were due from Hale & Rust at any time from August 1, 1865, to March 1, 1866, and, if any, did Hale & Rust actually pay them in money to the collector. The various defenses, arising out of the fact of *no non-payment of taxes*, having happened during the life of the old bond, but all delinquency having occurred under the second bond; of the fact of the change and removal to a new place of business, in violation of the license and the conditions of the first bond; of the fact that the new bond was accepted by the collector as a substitute for the old bond, and that the defendant, Robbins, was not a party to this new bond; that he had refused on Hale & Rust's removal of business to longer act as surety, and that by reason of notice to that effect having been given to the collector, he took this new bond, and the fact that the principals in the bond, Hale & Rust, had actually given to the collector and his agent sufficient property to discharge all the liabilities sued on, and that none of that property was ever returned to Hale & Rust; and that thus, in fact and in equity, *full payment* of all delinquent taxes was made by Hale & Rust, though not directly in money, were one and all struck down, and ruled out by the demurrers; and the plaintiff in error thus deprived, as we think, of a just and legal as well as equitable defense.

Such in general are the leading facts, as alleged in the several pleas, and otherwise apparent on the cord. We have said in the opening that this case was one of peculiar hardship to the plaintiff in error. And we think the foregoing statement of facts must at once so strike a disinterested mind. Robbins had no interest in the affairs of Hale & Rust, his principals. He consented to sign the bond of July 1, 1865, as their surety, binding himself only, as he understood it, to the obligations, and by the limitations and recitals therein. When he found, in September, that the risk of the business was increased, and the bond, as to its recitals of a place, violated by his principals, changing their place and amount of business, he at once refused longer to remain as their surety, and notified both his principals and the collector. Then the collector took a new bond, in lieu of the old one, and he supposed he was

released from all liability except on the bond he had signed. This supposition of his was strengthened and confirmed, if it needed confirmation, by the fact that the collector by his agent, and the surety on the new bond, received from his principals, ample means to discharge all taxes—*none* of which were delinquent under the bond which he had signed—and after Hale & Rust, his principals, had thus given up ample property to pay all taxes, they abandoned their business. By reliance on these facts, and the promises and agreements of the collector, he permitted his principals, Hale & Rust, to go on as they did, giving up their property; and so, by his confidence in an officer of the Government, the plaintiff, the collector, and in reliance on the good faith of the officer in demanding a new bond and accepting it, and on the fact that he had only bound himself according to the terms and stipulations of the bond he had signed, he lost all chance of protecting himself by getting property or security from his principals, and has been adjudged to pay the *full penalty* of a bond he did sign, but *under which no breach happened, and all of which conditions were fully kept and performed; and under which not a dollar was due the obligee thereof, the United States.*

Such being the facts in the case, does the law demand that the just and equitable defenses established by the facts shall be denied? We say, it does not so demand, and if it did, such demand would be a reproach to the law.

We now consider briefly the several pleas demurred to, and the law applicable thereto:

1. There are no special preliminary demurrers or demurrers with special causes assigned, but each one is simply a general demurrer to a plea. Therefore no duplicity or formal defect in a plea, can be taken advantage of in this record, if such exists.

1 Woodbury & Minot, 1 Circuit Court R. U. S., *Jackson v. Rundlet*, 381.

Act of Congress, September 24, 1789, ch. 20, sec. 32.

2. The plaintiff below has, in each of his several demurrers to

the pleas, prayed for judgment for the whole matter in the declaration, and thus admits that the defendant has in each plea answered to the whole matter, but has answered badly.

Kerr v. *Force*, 3 Cranch C. C. R. 8.

3. If several pleas be demurred to, one of which is good, judgment must be given against the plaintiff.

United States v. *Girault*, 11 Howard, 22.

Kerr v. *Force*, 3 Cr. C. C. 8.

4. If oyer be improperly demanded, the defect is aided on general demurrer.

Sneed v. *Wister*, 8 Wheaton, 691.

5. There are seven pleas in the record demurred to; and to each the demurrer was general, and was sustained. There is some confusion on the record as to the numbering of the pleas, by some mistake of the clerk, but it is immaterial, as the rulings were made. Including the plea of the general issue, there are nine pleas. Pleas 8 and 9 were replied to, plea 5 should be numbered 6, and plea 6 should be No. 7; but leaving out of view the plea of *nil debet*, as to the rest of the pleas, plea numbered 2 should be No. 1, and so on.

The first plea demurred to is that of *nil debet*.

That such a plea to an action grounded on a bond, as the foundation of the action, is bad, is as well settled as that the same plea is good to an action on a bond, where the bond is mere inducement.

And the rule is well stated by Wilcox in his Practice, page 240. He was known to one member of this Court as a careful lawyer and writer. He says: "The general rule seems to be *that whenever the plaintiff must aver matters in pais*, to *suppport* his *action* on a *specialty*, *nil debet* is *pleadable*," and he cites to sustain his conclusion:

Salk. 284, 565; 1 Saunders, 38; 8 Johnson, 83.

The error in this plea, in this case, is, we presume, that the averments of the matters *in pais* in the narr., are not such matters *in pais*, as form the legal support of the action, though by some authorities they are so held. But the weight of authority is largely the other way, and we therefore admit the demurrer was well taken.

The second plea is next demurred to.

An analysis of the plea shows the following facts plead:

1. That the plaintiff in error was only a surety for his principals, Hale & Rust, on the bond sued on.

2. That this bond was executed on the 1st of July, 1865, and that after the execution of it, he found that his said principals had changed their place of business, and had largely increased the amount and risk of the same from what they were when he became surety.

3. That thereupon, in the month of September, 1865, he notified his principals, Hale & Rust, and also the collector, who was the proper officer to notify in that behalf, and who had authority to receive bonds from manufacturers of tobacco desiring license, that he would no longer act or remain as such surety on said bond.

4. That after said notice was so given and received, the said collector required said Hale & Rust *to execute a new bond*, in lieu of the one in the declaration mentioned, in the penal sum of $15,000, with said Hale & Rust as principals, and said Herod as surety. But plaintiff in error *did not* sign this new bond. The general conditions of the new bond were the same as in the old one—the penalty was $15,000, instead of $6,000.

5. That this new bond, though on its face bearing date May 1, 1866, was really executed in September, 1865, and was *antedated* to May 1, 1865.

6. That said new bond was, in September, 1865, *delivered* to and *accepted by* said collector of said district, by and with the knowledge and consent of Hale & Rust, principals, and Herod and the plaintiff in error, Robbins, as the sureties on the old bond, "*in place* of *and* as *a substitute for the old bond.*"

7. That the said Hale & Rust, principals, thereafter carried on their business under said new bond, with the knowledge and consent of said collector.

8. T[illegible] during the months of July, August, and September, 1865, *and which embraced the whole period of time between the execution* of *the old* bond of July 1, 1865, the *one declared* on, *and the delivery* and *acceptance* of the new bond in September, 1865, as a *substitute for the* first one, the said Hale & Rust, principals, faithfully kept and performed all the conditions of the first bond, etc., and did not, etc., *specially* negativing all the breaches assigned.

This plea in bar, if good in law, is a perfect defense to the suit. We do not know what objections to this, or either of the special pleas, may be made by the attorney for the Government; and may not, therefore, in our brief meet them as we otherwise would try to do.

The various provisions of the revenue laws applicable to the case, the court will of course take judicial notice of.

By them it was required, that before any persons could embark in the business of tobacco manufacturers they must obtain, from the assessor of the district, a license to carry on such business; and the law particularly specified what facts must be stated in the application for such license. The law which was in force at the time the bond of July 1, 1865, and September, 1865, were given on this subject of license, were the acts of June 30, 1864, and March 3, 1865. The Supreme Court of the United States has already placed a construction on some of the provisions of these acts, which apply here. 8 Wallace, 587, *United States* v. *Smith.* Although this decision will more particularly apply to a

subsequent plea, yet in one important point it applies here, and that is: that the life of the bond, upon the giving of which the license is granted, *is only co-extensive* with the *extent* and *duration of the license.*

The act of June 30, 1864, by sections 71 and 72, prescribes the conditions under which licenses shall be given; by section 73, subjects all persons who neglect it to fine and imprisonment; by section 74, fixes the limit to the license, beyond which time the parties to the bond are not bound to answer for any breach of the condition; and by section 87, provides that, "Manufacturers of tobacco, who shall then be engaged, or shall thereafter engage, in such manufacture, shall, in addition to the license before required, obtain a permit, under the conditions prescribed in said section; and that in the event of any change or removal of the place of business by the manufacturer, notice must be given by him, *and a new permit must be obtained* to *carry on the business at the place removed to, and it is made illegal to manufacture, at the place removed to, without this new permit, and to do so is made punishable by fine and imprisonment.*"

By section 12 of the act of Congress passed March 3, 1865, amendatory to the act of June 30, 1864, a bond is required to be given, by any manufacturer of tobacco, before a license shall be issued to him as aforesaid; and the bonds in question are based on this 12th section and the sections hereinbefore cited as to licenses.

Now, the main legal question arising under the facts, and the provisions of law referred to in this second plea, is this—was not the bond of September, 1865, thus taken by the collector, in place of and as a substitute for that of July, 1865, a valid bond, and did not its acceptance, and the doing of business under it, put an end to all liability, on the part of the plaintiff in error, upon the bond he signed of July, 1865, for any and all breaches which happened *after the* acceptance of the new bond? We think the new bond was valid, and, as it is admitted by the demurrer, that no breach occurred during the months of July, August, and September, 1865, nor until after the new bond had been given, that all liability of the plaintiff in error was ended.

1. The collector had power to take the bond as a substitute for the old one. He had, indeed, no power in so doing to release

the obligors of the first bond from any liability under the first bond, prior to such substitution, and no such liability existed. The only power he did exercise was in taking a new bond upon or after the *removal* of the obligors, the manufacturers, to a new place of business, and this, too, after notice on the part of the plaintiff in error. The old bond was given under the law, to secure a compliance with the conditions of the license, and follows its recitals. It went and could go no further than this under the statute. A limit to that license is fixed in the law. There is a limit of time, but also there is a limit without regard to any period of time. That limit is *so long as* the manufacturers shall carry on their business at the place in which the license permits, and no longer—it is a special authority to manufacture at a particular place, and nowhere else. A change of place then, and a removal of the business to a new place, puts an end to that license, so far as the surety is concerned, at least. By the bond, in its recitals and conditions, he was to be liable for the breaches thereof at this special place, and nowhere else. Now, when the fact was made known to the collector of this removal, he could, it is true, have indorsed the license, and then, by compliance with the other provisions of the statute, in getting a new permit, the manufacturers might have been protected, but any such indorsement of the license, without the consent of the plaintiff in error, as surety, would have discharged the surety, because it would have altered the terms of his obligation of suretyship, which, as has been said, was limited to the faithful conduct of the principals at the special place in the license named. But the question of what would have been the liability of the plaintiff in error if such indorsement had been made, does not arise now, because, in fact, there was no such indorsement, nor is any such fact alleged, by way of replication, as it must have been to aid the defendant in error.

The collector was wiser. He saw that these manufacturers, after this removal, were carrying on business at a new place without a bond, in conformity to the law, and he proceeded to take a new one in place of and as a substitute for the old one. The power given him to take bonds from manufacturers of tobacco

was general; it was one to be exercised whenever necessary to carry out and support the law. It is true that no special section of any statute, so far as we know, expressly then gave the collector power to change or renew bonds at his discretion, in so many words, but the whole intention and object and spirit of the laws we have cited, warrant, and, indeed, demand it; without such power the very object of the statute would be defeated. There is no restriction imposed on the collector in this matter. His duty is plainly to see that bonds, and good and proper bonds, are given and kept in force, to insure the observance of the revenue laws, and the proper payment of taxes from manufacturers of tobacco. To perform this duty, and secure these objects of the law, discretion in him, to some extent, is absolutely needed. Suppose that he has, in good faith, accepted a bond from a manufacturer of tobacco prior to the issue of a license; that after this issue and the commencement of business by him the collector discovers that he has been deceived innocently as to the goodness of the bond in any particular, and that it is not such a bond as the law in its spirit contemplates, though technically a good bond; and suppose, also, that the manufacturer, in giving it, was honest, and also misled as to the ability of the sureties, or as to any other fact, what is to be done? Unless the manufacturer, in such a case, would consent to the giving a new bond, then the law would be utterly defeated in that case, as the collector, by the supposition, would have no power to demand a new bond, or, at his own discretion, to change and substitute one for the other; and, as we claim, it was in the exercise of this necessary implied power, under the laws, that, in this case, the collector did substitute the new bond in lieu of the old one.

But other considerations point to the same legal conclusion:

1. The new bond is in form a statutory bond, was intended as such, and could not have been legally and properly taken and accepted as such *except upon the theory* that the first bond was determined in law, as it was.

2. But if the law in its spirit did require a bond, then the new bond, though even it were not technically a statutory bond, yet it would

be a good bond at common law, and could be enforced; and if enforced as such, it would be by virtue of the voluntary action of the obligors in executing it, and of the collector in accepting it, *according to the agreement for substitution*—the spirit of the law giving the power and the agreement making the consideration.

We are not without ample authorities to show the power of the collector, outside of any express provision of the statute. Such power is expressly affirmed in the following among other cases:

The United States v. *Tingley*, 5 Peters, 114.
The United States v. *Bradley*, 10 Peters, 343.
The United States v. *Linn et al.*, 15 Peters, 290.

These cases, after thorough argument and deliberation had, hold that:

"A bond voluntarily given to the United States and not prescribed by law, is a valid instrument upon the parties to it in point of law. The United States have, in their political capacity, a right to enter into a contract, or to take a bond in cases not previously provided by law. It is an incident to the general right of sovereignty; and the United States, being a body politic, may, within the sphere of constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law and appropriate to the just exercise of those powers."

We regard, then, this second bond as having been legally accepted by the collector in lieu *of and* as a *substitute* for the first one—and as binding upon the defendant in error to the extent, and for the purposes, and upon the consideration the plea sets out, to-wit: to be a substitute for the old one; it was expressly given and accepted on such condition, and for such purpose, and unless this agreement is sustained, then the bond must be invalid. It was a contract in reality, under seal, by which the collector, without any express sanction of the statute, undertook to get a new security for the future compliance of the principals, Hale & Rust, with the law in their business. It was a proper and necessary contract for

the interests of the Government—*all the parties* to the old bond thus agreed to be given up were consenting thereto; it was made because Hale & Rust had changed their place of business, and because by that change the old bond had become useless as a statutory bond, and because the plaintiff in error, Robbins, as one of the sureties on it, refused longer to remain as surety; and as it had ended as a statutory bond, Robbins *could not be held on* it, *after its statutory death*, as upon a common law bond, if at all, unless most certainly he had consented thereto, either affirmatively, or by silence, after a knowledge of the facts. While, then, it is to be sustained as a valid bond at common law, it can only be in strict conformity to the terms and spirit of the contract, which was that it was to be a substitute for the old one, which was to be considered as to all parties *as dead* and invalid after the acceptance of the new one. To this exercise of power in the collector, to thus change the securities—to discharge one, to increase the penalty by $10,000—surely no good moral objection can be made; it was just, it was equitable; it was for the interests of the Government, and the power of the collector, which we have shown, to take a new bond, where the law expressly did not call for it, is no greater or different than the power to substitute by contract the one for the other, and unless he had thus agreed to substitute, he could not have had a new one at all. But in determining the rights of the plaintiff in error under this plea, it must not be lost sight of that this new bond, if one at all, was a *substituted* one—it was *not an additional* bond—not a collateral bond—but was to be the only bond on which the Government was to *depend* after its acceptance. To deny the plaintiff in error the benefit of this contract, which he caused to be made for his benefit, so far as he was concerned, would be an act of bad faith and injustice to him, and the Court will not do this if power in the collector to make it can reasonably be found. This very power of the collector to change and renew bonds of tobacco manufacturers at his discretion, under instructions of Commissioner of Internal Revenue, was afterward recognized by statute in the law of July 13, 1866, sec. 87, amendtory to the acts of June 30, 1864, and March 3, 1865. This

provision must, in the light of the cases cited, and a correct view of the general principle involved, be regarded as merely cumulative to the power already existing, and as also showing that the power of the collector to change, renew, and substitute bonds at his discretion, under the instruction of Commissioner of Internal Revenue, was considered a wise and necessary one by the Government. There was no *need* of the provision to a legal mind. To public officers not versed in the law, it serves to make plain a right and power which by them might be supposed not to exist. As to the form of the plea, as regards the substitution of the one bond for the other, we followed the form in Swan's Practice and Pleading, vol. 2, pp. 726–728; also in Wilcox's Practice p. 244. This form was used in 6 Ohio, p. 336, and sustained by the Supreme Court of Ohio.

The third plea is next demurred to. This is a well known and ordinary plea of performance of all the conditions, whether negative or affirmative or disjunctive, contained in the bond declared on

The *narr.* sets out in full the bond with all its conditions, but makes no profert of it, and then assigns the breaches, three of which, however, were waived. The plea, it is true, craves oyer, which it was unnecessary to do, because no profert had been made, but if this be a defect, it was cured by the general demurrer. "If oyer be improperly demanded, the defect is aided on general demurrer, but it is fatal to the plea when it is set down as a cause of demurrer."

Sneed v. Whister, 8 Wheaton, 690.

But also the defendant who has oyer is not bound to insert it in his plea.

2 Strange, 1,241.

The plea does not recite the bond or conditions as upon oyer, and then plead performance. Had oyer been necessary, it is possible this might have been required; but if it is, it could only have been so required on the sharpest technicality. For the sole reason in craving or having oyer, being to enable the party craving it, to have spread on the record the whole instrument, either to be demurred or plead to, where this is already done, as was here, by the whole instrument, being set out in *hæc verba* in

the narrative, the recital of it in the prayer for oyer would have been simply, if allowed, to incumber the record by a duplication in the pleadings of the instrument. But as no oyer was of right demandable, no profert having been made, the general demurrer clears off all objections either to the prayer for oyer or to its imperfection in not reciting the conditions and the bond, before further pleading, *if it* was an imperfection.

The plea is one of general performance, but not merely of affirmative performance. Had it been merely that, it would have been bad. The form of this plea is, excepting the recital as an oyer, the one found in Chitty and other text books. The plea is under the rules as laid down by Stephens in his work on Pleading, edition of 1867, in marginal pages, 356, sec. 6, and 359, sec. 7, and the intermediate pages up to 368.

Rule 6 is, "A general mode of pleading is allowed where great prolixity is thereby avoided." Rule 7 is, "A general mode of pleading is often sufficient where the allegation on the other side must reduce the matter to certainty." "This rule comes in most frequent illustration in pleading performance in actions of debt on bond." The general allegation of performance does not, of course, properly apply to negative or disjunctive matters, and it is said that with respect to such matters, the allegation of performance should be more specially made, so as to apply exactly to the tenor of the statute, or the collateral instrument, or of the negative and disjunctive matters in the obligation.

This plea follows these rules. We suppose that had the *narr.* merely declared on the bond, without setting out any breaches, no question could have been made against the plea, except by special demurrer thereto, for craving oyer improperly, but as we have said that was cured by the general demurrer. The result, then, must have been to go to trial on the *narr.* and this plea and a replication setting out special breaches, with rejoinder thereto. Now the object of the rules of pleading, being merely to bring the parties to an issue, why is not this object as fully met by this plea, *which fully covers and traverses* all the *breaches assigned* in the *narr.*, as if no breaches having been assigned in the *narr.* This plea had been met *by these same breaches* assigned in a replica-

tion, and the defendant had rejoined simply to this replication. Is not the issue in either case precisely the same? It would be in either, only an affirmance on one side, of the breaches and a denial of them on the other. And the denial is just as specific in this plea to the *narr.*, as it would have been in the rejoinder to the replication, had it assigned them. Because, in the plea, as will be seen, while there is an averment of full performance of all the affirmative obligations, *each* negative and disjunctive condition is *specially* denied. Now, the breaches assigned are five in number, and all are met by this plea, though three of them are waived.

The first is a general denial in the language of one of the conditions, and could only be met, as it is, by a general averment of performance. The second is a breach for non-payment of taxes during a certain time. This is met by an averment of full payment of all taxes and dues under the said bond. The breach was improperly assigned as of non-payment for a time, which, in fact, was not legally covered by the bond sued on. The plea properly meets all the breach which could be assigned under that condition in the bond, and no necessity exists if a plaintiff chooses, under such a condition, to either confine his breach to a less period of time than is covered by the bond, or to assign it for a longer period, for a defendant to do more than fully, by direct averment, to aver by way of denial or performance, as the case may be, a full compliance with the condition assailed. The averment in the plea, as to time, covers the breach, as the major includes the minor. The third breach, which is general, is met with a special denial. The fourth is similar to the second, and is similarly met, and the fifth, which is general, is specially met.

The issues, then, are clearly made; no confusion could arise in the trial as to them. Now, if more than this is demanded, then it must result from a mere neglect of form; and such neglect could only be taken advantage of by a special demurrer, which was not put in. Or, if the plaintiff below in declaring should more technically have only declared generally on the bond, leaving the breaches to be assigned upon replication, when forced by the plea "to reduce the matter to certainty," in the language of Stephens,

and so requiring a rejoinder, then, as the first fault in pleading would have been that of the plaintiff, he could not complain. In any aspect, it seems to us that this plea and *narr.* and demurrer fall clearly under the sanction of the Judiciary Act before cited, and where the court must disregard all mere formal defects, whether of order in time of the pleading, or otherwise, to reach the substance, no special demurrer having been filed.

If the court, however, are of the opinion that it is *matter of substance* that the plea should have been more special, then the plea is bad.

The fourth plea is next demurred to. This is a plea really of mere non damnificatus; and on examination, we are satisfied that the demurrer to that was well taken, and that it is a bad plea.

The next plea demurred to is named as the fourth, but is really the fifth. This plea avers:

1. That the plaintiff in error was only a surety for his principals, Hale & Rust, in the bond sued on.

2. That the bond was given by virtue of the laws of the United States, as a condition precedent to the granting a license to said Hale & Rust, as manufacturers of tobacco, at the corner of Banklick and Ninth streets, Covington, Kentucky.

3. That Hale & Rust had made application for this license under the law.

4. That this bond, in all its conditions and obligations affecting the plaintiff in error, was given by Hale & Rust, and accepted by the plaintiff, *solely* in reference to carrying on such business of manufacturers of tobacco, at said place, corner of Banklick and Ninth streets, Covington, Kentucky, so as aforesaid recited in said bond, and *at no other place whatever.*

5. That said Hale & Rust, on or about the 1st of September, 1865, removed their business, as such manufacturers of tobacco, wholly from said place so recited in said bond, and from thence hitherto have never carried on said business at said recited place.

6. That after such removal, they established and carried on their business as such manufacturers at another and different place—on Pike street, in Covington.

7. And the plaintiff in error avers that this change and removal was without his consent.

8. And that he, as such surety, executed said *bond upon its recitals and conditions only, and they confined* his *liabilities to* any *breaches of the same* which should happen while the said Hale & Rust so carried on business at said recited place.

9. And that none of said breaches occurred during the time business was carried on at the place so recited.

10. And that during all the time Hale & Rust carried on business at the place so recited, they kept all the conditions of the bond, etc.

The facts admitted by the demurrer, raise the question whether a surety, who signs a bond for the correct doing of business, at a certain place named in the bond, and to which place the principals were by the law limited by their application and their license, and whose obligation as surety is entered on, and agreed as such, by the obligees of the bond, to be limited and confined solely to wrong doing of the principals at that particular place, can be held as surety for a violation of law by his principals in doing business at another and different place, and without his consent—no breach occurring while business was carried on at the place he bound himself to?

It would seem the mere statement of the proposition would furnish the answer.

A surety shall only be bound by the very letter of his contract. He shall stand upon the very terms of it. They shall not be extended, nor changed, nor varied; nor does it make any difference whether such change or variation is beneficial or otherwise to him; and it is equally immaterial, whether the recitals or the terms of the obligation of his suretyship—to whose change he objects—are slight and formal, or weighty and important. He is the sole judge

whether he will bind himself as surety to an obligation as it is written or not; if he signs it, he does so just as it is, with all its recitals and conditions contained. He may attach great importance to recitals in it, which the principals or the obligees might regard as trivial, it makes no difference; and in this case the express averment is that he did so sign the bond, relying on *the recital* in the bond that his principals had applied for a license to carry on business at the particular place named, and his obligation was, he avers, made solely with reference to that place and no other. To the faithful conduct of his principals *at that place* he bound himself; for any breaches there, he bound himself, but for no other place.

And it is averred and admitted, that *no breach did* occur at that place, or while the business was carried on at that place, but that, if any breach did occur, it was after his principals had removed their business to another place. To hold him, then, for misconduct of Hale & Rust, at another place of manufacture, is to go out of the bond—to interpolate new terms and conditions in his obligation—it can not be done. The rule of law on this point is so well settled that it seems almost idle to cite authorities. But we refer to a few:

Miller v. *Stewart*, 9 Wheaton, 681, Story, Judge, says: "Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To *the extent, and in the manner, and under the circumstances* pointed out in his obligations he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He *has a right to stand upon the very terms* of *his contract*; and if he does *not assent to any variation* of it, and *a variation is made, it is fatal.*"

Also in *United States* v. *Boyd et al.*, 15 Peters, 187: "The liability of a surety is not to extend by implication *beyond the terms of his contract. This undertaking is to receive a strict interpretation* and not to extend beyond the fair scope of its terms."

Also see 1 McLean, 493, *Myers* v. *United States.*

If this plea is held bad, then there is denied to the plaintiff in error his right to stand on his contract.

The next plea demurred to is numbered five on the transcript, but is six.

The main facts in this plea are:

1. That the collector of the Fourth District of Kentucky, in which district the writing obligatory in the *narr.* set out, was given, *had full power and authority* at *his discretion* to change and renew the bond of the said Hale & Rust as such manufacturers of tobacco as to sureties, or the amount of the penalty thereof.

2. That the said collector did so change the bond of Hale & Rust both in amount and sureties, and did, on or about 15th of September, 1865, take from said Hale & Rust, as such manufacturers, another bond with other sureties, and in a much larger amount of penalty, to wit: $15,000, and to which bond plaintiff in error was not a party.

3. That this changed bond was given by Hale & Rust to said collector under the law to secure the full compliance of them, as such manufacturers of tobacco, with all the provisions of law affecting them as such manufacturers.

4. And that prior to the execution and delivery of said changed bond of September, 1865, said Hale & Rust had removed their place of business, as such manufacturers of tobacco, from the corner of Banklick and Ninth streets, Covington, Kentucky, which was the place where they did business as such manufacturers when the bond in the *narr.* set out was given, to Pike street, Covington.

5. *And that none of the breaches of the bond sued on occurred prior to said removal to Pike street.*

By this plea, and the demurrer, it is admitted that none of the breaches happened during the time of the bond sued on, and that all did occur after this new bond was given. This new bond was given, as is admitted, under the law to secure the good conduct of the principals in carrying on their business at another place. How then can the plaintiff in error be held for obligations he did not

assume? The terms of the old bond bound his liability to a certain place of business. The law required, as we have before said, that on such removal, before the principals could legally go into business, a new bond should be given. It was so given, and for the express purpose of covering defaults in conduct, by Hale & Rust at the new place, not at the old one. Those defaults were provided for by the bond sued on. The allegation is, that the new bond was taken as a changed bond—and it is *averred as a fact* in the plea, that the collector had full *power* to so change the bond. The power is thus admitted—the logical results of the exercise of such power, as stated, are the discharge of the plaintiff in error. But even if this allegation of power is not properly one of fact, but is to be considered only as one of law, then the provisions of law before referred to do give this power. But in addition to the provisions as to license, and permit, and removal, before referred to in considering a prior plea, the new bond, if looked on as a mere voluntary bond, being accepted for the purposes, and under the circumstances as stated in the plea, it was a valid bond—and did cover all subsequent breaches—and *e converso*, the plaintiff in error was only held for breaches under the bond he signed.

This bond of July 1, 1865, was given under the law of June 30, 1864, and March 3, 1865, before cited. Section 12 of the law of March 3, 1865, prescribes the bond, and requires it to be *given before* any *license is issued.* Sections 71, 72, 73, 74, and 87, of the act of June 30, 1864, prescribe as to the license and permit. The Supreme Court of the United States, in the case before referred to, has adjudicated on the liability of a party to a bond thus given as condition precedent for a license. 8 Wallace, *United States* v. *Smith*, 587. The Court say: "Under the act of June 30, 1864, to provide internal revenue to support the Government, etc., which requires a license to persons exercising certain occupations, and fixes the limits to its duration, the parties to the bond given on the granting of the license *are not bound to answer for any breach of the bond after the expiration of the license.*"

In that case, it is true, the license had expired by limitation in time, and not by removal of business. But the principle of the

decision completely covers this plea—that is, that no party to a bond, given to secure a license, under the act of June 30, 1864, can be held for any breaches of the bond happening *after* the expiration of the license. The only question, then, is, what is an expiration of the license? It is given under the direction of the law, and by them is limited in duration, both in point of time and purpose. The limit of time is one year, but *only* when the business is still carried on *under that license*, as therein specially authorized at the special place therein named. When the party who has got a license, changes this place, and removes his business to a new place, *then*, by that act alone, the license expires, and he must obtain a new permit, and he must have his license renewed.

Nor would such renewal bind the surety to the bond, unless he had consented thereto.

If we are not mistaken, then, in the true effect of the decision in 8 Wallace, that decision ends this controversy, for, by the law, and by the terms of the license itself, *it had expired* by the removal, before any breaches had occurred under the bond; and it is sought to make the plaintiff in error liable for breaches which happened *after this expiration* of the license.

But also, by another rule, a security on one bond is not liable for defaults happening under a subsequent one to which he is not a party, or for any that occurred prior to his signing the bond.

Myers v. *United States*, 1 McLean, 493.
United States v. *Boyd*, 15 Peters, 187.
Farrar & Brown v. *United States*, 5 Peters, 372.
United States v. *Giles et al.*, 9 Cranch, 212.
Miller v. *Stewart et al.*, 9 Wheaton, 680.
United States v. *Kirkpatrick*, 9 Wheaton, 720.

The last plea demurred to is numbered in the transcript six, but is in fact seven.

This plea avers as its main facts:

1. That the collector for the Fourth Collection District of Kentucky, on or about December 1, 1865, ordered the tobacco factory of said Hale & Rust, with its stock and machinery, to be seized for violations of revenue laws, and that papers to that effect were made out.

2. That the said violations were the same as assigned in the breaches in the *narr.* herein.

3. That to prevent the execution of this order, and to secure to the United States the payment of the taxes due, it was agreed on or about the 23d day of February, 1866, by and between the collector, on the part of plaintiff, and the said principals, Hale & Rust, and one Andrew H. Herod, that said Hale & Rust should place in the hands of said Herod, *as the agent* of the *said collector*, and for *the security* of *the plaintiff*, an amount of property sufficient to satisfy and discharge all the liabilities of Hale & Rust for the non-payment of taxes.

4. It was also agreed between said parties that when a sufficient amount of property should be so placed in said agent's hands, then that said collector would revoke his order of seizure, and the papers therefor should be withdrawn.

5. It was further agreed by said collector and Hale & Rust, that the said property, when so placed in the hands of said agent, Herod, should be by him sold, and the proceeds should be paid over to the collector to pay said taxes, and that said collector would look only to said property to pay said taxes.

6. That in conformity to this agreement, said Hale & Rust *did* give to said Herod, for the sole purpose aforesaid, a sufficient amount of property to satisfy all said taxes.

7. That this property included, among other things, all the stock, fixtures, and machinery of the said tobacco manufactory of said Hale & Rust, together with a large amount of good collectable drafts and acceptances belonging to said Hale & Rust, and thereupon the collector did revoke his order of seizure, and the papers therefore were withdrawn.

8. And that sufficient property to pay and discharge *all* the *liabilities* of said Hale & Rust, *under the bond in the declaration set out*, was, by said Hale & Rust, so left in the control and authority of said collector.

9. That after the agent had so turned over this property, Hale & Rust abandoned their business as tobacco manufacturers in said

city of Covington, and had no longer any control or authority over the said property, but the same was in the control of said collector, the officer of the plaintiff.

10. That the plaintiff in error was only the surety on said bond for Hale & Rust, and that his principals so placed in the hands of the obligee of said bond security in full for all liabilities under said bond.

11. That by reason of the premises, he is discharged from all obligations, etc.

The only question made below on this plea was the want of power in the collector to receive the property and acceptances, etc., from Hale & Rust in payment and satisfaction of the only two breaches not waived, the non-payment of taxes.

The fact is clear from the plea, and is so admitted by the demurrer, that the collector did receive, by his agent, the *whole* amount due from Hale & Rust, under the bond sued on; that even the entire establishment was thus given up to the collector for the use of the plaintiff, and he did retain the whole.

At first blush the extraordinary hardship and injustice of again asking the plaintiff in error for payment of the very liabilities which thus, in fact, were by his principals paid off, is most evident, and this hardship becomes the more apparent when it is seen that, by this taking for the plaintiff, by the collector, of the entire property of the principals, the poor surety is left without any chance to come on that property to protect himself. No court will compel a surety thus to suffer, unless he is absolutely driven to do so by the strict rules of law. Fortunately it is not so driven. Had the collector then power to do what he did? If he had, the plaintiff in error is discharged. We consider this question settled by both reason and the authorities. The obligation of the surety being to save the Government from loss by reason of non-payment of taxes, if the Government, by its officers and agents, do obtain from the principal, by his consent, property or effects ample to prevent such loss, no matter whether it is got in money or not, certainly, in an equitable point of view, the surety's obligation is fulfilled. It is

true, the obligation is, that the principal shall pay in money, yet the Government, as a creditor, has the same right as a private creditor to accept property, to be by it turned into money. And when so accepted, the obligation is on it to turn it into money; if it has agreed so to do, yet chooses not to do so, it is not the fault of the surety, nor can he be prejudiced thereby.

It is held in 4 Wash. C. C. R. 620, *United States* v. *Howell*, that "officers of Government may, without any law, take securities from the debtors to the public for what they may owe." The precise point here did not arise in that case, which was whether a surety in that case was discharged by reason of time being given, but the above language of the Court gives sanction to our proposition.

This authority of Government officers to secure debts by contracts or agreements, or taking bonds not called for by law, or mortgages, or otherwise, and holding such acts and instruments legal, is also held in the cases heretofore cited:

United States v. *Tingley*, 5 Peters, 114.
United States v. *Bradley*, 10 Peters, 343.
United States v. *Linn*, 15 Peters, 290.
United States v. *Maurice*, 2 Brock, 96.

And if a collector may, as we have seen, take a bond or other securities to *secure* a liability which is not provided for in the law, *a fortiori*, may he take property to be by him or his agent sold in full payment? Having then this power to take the property in amount sufficient to pay, and so taking it, as he did in this case, the correlative duty is implied to apply it to the payment, and it must be considered under the circumstances as paid, and as a consequence the surety's liability is ended. We admit that where a Government officer merely takes collateral security without suspending the original cause of action, the surety is not discharged.

United States v. *Nicholl*, 12 Wheaton, 505.

But under the facts in this plea, the property taken by the collector from the principals, Hale & Rust, *was not taken* or given as col-

lateral security, but it was expressly by the contract and agreement to be received in full payment of all that was due the Government under the bond sued on; and the fact is admitted that sufficient property to pay and discharge all the liabilities of Hale & Rust under the bond, *was* under this agreement handed over, and was retained by the collector and his agent.

It has been contended that a bond could not be discharged except by some instrument of equal dignity. But such is not the law. In the case of the *United States* v. *Howell*, 4 Washington C. C. R. P. 622, the Court, Washington, Judge, say: "If in this case (referring to *Davey et al.* v. *Prenaergrass*, 5 Barn. & Ald. 187) the court meant to lay it down as a law, that a surety in a bond conditioned for the payment of money, or the performance of certain acts by a third person, can not be discharged from his obligation except by some instrument of equal dignity, I must be permitted to dissent from such a doctrine, and to maintain that it is insupportable by a single authority. Will not performance *in pais* by the principal discharge the surety? May not the surety, and may not even the principal, discharge himself by acts *in pais* tending to excuse the non-performance, by showing that it was occasioned by the conduct of the creditor?"

This principle thus laid down is correct, and its application to this plea is evident. Here the acts *in pais* by the creditor and the principals in the bond were of such a character as to amount to performance by the principals. They were based on this *call for performance* by the creditor upon the principals, and their acceptance of this call, and by their acts which the creditor accepted and acted on as a full performance. The plea leaves no doubt on the question as to whether the taking by the collector of the property was for mere collateral security, or for full payment, and by way of performance by the principals, nor as to whether the amount was sufficient to pay and make a full performance.

For the above reasons we insist the plea is good.

We claim on the record then, that five of the seven demurrers were not well taken, and that error was committed below in sustaining them; and that we are entitled to have the

judgment below reversed, and an opportunity afforded the plaintiff in error to bring before a jury the facts in his pleas alleged, so that his rights as a surety may be protected. If either plea is good, as we have before said, we are, of course, entitled to this reversal.

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